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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DONALD L. HELLING, CAROL E. PLOYHAR, JOHN V. IGNACIO, RONALD J. ANGELONE, and CHARLES HORN,

Petitioners,

v.

WILLIAM McKINNEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF ON THE MERITS

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I.

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II.

ARGUMENT

A. CONTRARY TO RESPONDENT'S SUGGESTION OF MOOTNESS, THE NEVADA DEPARTMENT OF PRISONS' POLICY ON SMOKING IN INMATE HOUSING AREAS HAS NOT CHANGED SINCE THE INCIDENTS WHICH GAVE RISE TO THIS CIVIL RIGHTS CLAIM, AND THE LIKELIHOOD THAT MCKINNEY WILL AGAIN BE HOUSED WITH A SMOKER HAS INCREASED.

McKinney and his Amici, the American Civil Liberties Union and the American Civil Liberties Union of Nevada, argue there have been "substantial" factual developments which may render a consideration of this case (at least as to injunctive relief) moot. Their position is based primarily upon McKinney's current housing in a single cell in a different Nevada correctional facility (Ely State Prison, hereinafter ESP), and a policy issued by the Director of the Nevada Department of Prisons (hereinafter NDOP) on January 10, 1992, regulating smoking throughout the state prison system. (Administrative Directive

53-92 dated January 10, 1992 - see Resp. Br., Appendix 1a). Respondents' understanding of the facts is, however, in error.

1. McKinney's housing is subject to change at any time. He is a 45-year-old convicted murderer who has been serving a life sentence, with two consecutive fifteen year sentences, and will be incarcerated for quite a few years, perhaps for the remainder of his life. Inmates frequently are transferred from one facility to another, or from one unit to another, for many reasons. Although McKinney may now be enjoying single cell status, this is unlikely to last for the reasons that ESP is a relatively new facility which now operates at close to capacity. As greater numbers of prisoners have entered the system, ESP has been converting single cells into double cells. Further conversions are

planned just to keep apace with normal increases in the prison population. Due to a state budget crisis, in early 1992 the entire medium custody facility located in Jean, Nevada was closed, causing the NDOP to reclassify and transfer approximately five hundred inmates among the remaining medium and maximum custody facilities in Nevada, including ESP. This, too, was a factor in the conversion of single cells into double cells at ESP. Because of continuing budget constraints, the likelihood that any new prison facilities will be funded is doubtful, and it is quite possible prison administrators may be compelled to close other facilities. Single cell to double cell conversions are anticipated for this reason also.

2. The underlying facts which allegedly prompted McKinney to file this particular civil rights lawsuit are quite

clearly capable of repetition. If the state were to raise the claim of mootness whenever McKinney's cell assignment changed or he was transferred to another facility, then McKinney's Eighth Amendment issue might never be judicially reviewed. He would have to file a new lawsuit every time he believed he was compelled unconstitutionally to share a cell with an inmate who smoked.

3. McKinney errs in stating the NDOP policy on smoking in prison facilities is new and changes the factual posture of this case. To the contrary, Administrative Directive 53-92 was primarily a revision of a previously-existing policy. (See Appendix to U.S. Br.) A.D. 53-92 superseded A.D. 24-91, issued January 7, 1991; A.D 24-91 superseded A.D. 35-90, issued January 15, 1990; and A.D. 35-90 superseded A.D. 56-89, issued on September 28, 1989.

(Copies of all these administrative directives will be lodged with the Court for its reference). Over the past four years, each of these directives stated the NDOP's policy on smoking within the state prison system, revised on an annual basis. All were non-confidential directives, available for inmate review (including by McKinney) in each of the prison law libraries. The most recently revised policy added a few common areas to those places designated as off-limits for smokers, but made no change in the portion of the policy which has been the focus of McKinney's complaint, specifically, that although reasonable efforts are made to accommodate non-smoking and smoking inmates, they are still subject to being housed together.

> Contingent upon space availability, Wardens may further designate non-smoking sections in inmate dormitory settings. Reasonable efforts may be made by the institutional classification

committees to accommodate non-smokers in double bunked housing areas. Non-smoking inmates who wish to be housed with another non-smoking inmate are to provide a written request to the Associate Warden Programs/Facility Manager. As with any incompatible inmate living situation, accommodations will be as necessary, consistent with security considerations and space availability.

(Appendix to U.S. Br.).

This language has essentially been a part of every administrative directive issued by the NDOP. When compared with the Affidavit of Don Helling, which was attached to defendants' Motion for Summary Judgment in June, 1987, it is readily apparent each successive administrative directive reflected what already had been the unofficial policy within the prison system, which provided that after an inmate is given an initial classification, his housing assignment will take into account his personal preferences "insofar as practical." (Joint Appendix at p. 21).

McKinney therefore errs when he argues this case is now moot. Under the "specific live grievance" requirement (Lewis v. Continental Bank Corp., 494 U.S. 472, 479 (1990)), McKinney can certainly expect he will be housed from time to time with smokers during his incarceration. Thus, the controversy is very much alive.

In addition, there are other important reasons for a decision in this case. It could be years before another case involving the issue of exposure by inmates to ETS reaches this stage. In the meantime, prison administrators are without any clear guidance as to their potential liability for placing smoking and non-smoking inmates in cells together, for varied lengths of time. The decision in this case is important because the ability of both state and federal prison officials to keep

flexibility and discretion in choosing how best to manage and control dangerous inmates, within budget, security and facility constraints, is at stake. This case will define the limits of Eighth Amendment claims where healthy inmates allege that their exposure to certain conditions pose future, though neither certain nor imminent, potential health risks. Amici and petitioners must know if prison officials will be required to protect inmates from exposure to ETS and any other types of potential health hazards, even when the non-incarcerated public is not similarly protected, and the particular hazard is generally tolerated in society as an acceptable risk.

4. Amici for McKinney argue the only portion of this case remaining is that of injunctive relief, and that McKinney has not challenged the district court's

finding that petitioners did not act with deliberate indifference to his medical symptoms (ACLU Br. at p. 10). But the Ninth Circuit Court of Appeals, on remand, reaffirmed its earlier decision that (a) McKinney had satisfied the objective part of the test for stating an Eighth Amendment claim and (b) the district court should reconsider whether petitioners had acted with deliberate indifference. (Pet. for Writ of Cert., Appendix A). Following the Ninth Circuit's order, petitioners filed their second petition for writ of certiorari, which presumably the Court would not have granted had it been satisfied that a remand to the district court for another trial was appropriate.

In any event, the state of mind of petitioners (for the purpose of determining deliberate indifference under the subjective component of Wilson v.

Seiter, 111 S. Ct. 2321 (1991)) may be irrelevant if this Court decides that McKinney cannot state a claim under the objective standard.

B. MCKINNEY HAD HIS OPPORTUNITY TO PRESENT EVIDENCE TO SUPPORT HIS CASE AT TRIAL; THE U.S. MAGISTRATE PROPERLY EXERCISED HER DISCRETION IN DENYING MCKINNEY'S MOTIONS TO APPOINT AND SUBPOENA EXPERT WITNESSES

1. McKinney argues he was improperly deprived of his right to present his case before the district court. This simply is not an accurate representation of the factual history of the case. McKinney took his complaint to trial, testified on his behalf, presented documents on his behalf, and called witnesses on his behalf. (Minutes of Trial, Joint Appendix at pp. 66-73). The U.S. Magistrate allowed all of McKinney's exhibits into evidence except one, which consisted of literature distributed by anti-smoking groups and primarily concerned with health risks of tobacco to

smokers, not to those exposed to secondary smoke. (Exhibit 14 of trial exhibits lodged with this Court). Although the trial transcript is unavailable, it is likely McKinney was unable to establish a foundation for the admission of these exhibits. McKinney represented himself to be a non-smoker and was attempting to prove the health risk to non-smokers of exposure to ETS. The literature in Exhibit 14 did not address that issue and was therefore properly excluded. McKinney was permitted to argue for admission of Exhibit 14 on the second day of trial, and the U.S. Magistrate took his motion under submission. On the third day of trial, the Magistrate denied his motion to admit Exhibit 14. (Minutes of Trial, Joint Appendix at pp. 71 and 73).

2. McKinney asserts it was improper for the U.S. Magistrate to deny his

motion for a court-appointed expert witness. (Resp. Br. at p. 3). He argued that he needed an environmental toxicologist to help him prove his case:

> Here, plaintiff has shown that he is an indigent prisoner without funds sufficient to cover the expenses of an expert witness who will testify at the trial in this case. The expert witness' testimony is absolute[ly] necessary in trial of this case. Wherefor[e], Plaintiff prays that this court appoint an environmental toxicologist as an expert witness for the plaintiff; That this expert witness be compensated for his participation in trial, discovery research, and travel expenses...

(Resp. Br., Appendix 8a).

But as the U.S. Magistrate explained:

> "the appointment of experts by the court occurs rather infrequently. Such appointments are not for the benefit of a particular party. Moreover, court appointed experts do not become the representatives on behalf of a particular party. Such experts serve as an independent source of assistance to the Court, and from whom the parties may learn of his or her findings.

(Resp. Br., Appendix 11a).

The purpose of F.R.E. Rule 706 is not to appoint an expert witness to help a party prove his case, but rather to assist the Court in evaluating and deciding the facts in a case. It is within the sound discretion of the Court to make that determination, and McKinney has not pointed to a single fact to show that an abuse of discretion occurred. The argument that McKinney or any indigent plaintiff believes his case will be more easily proven with the assistance of an expert witness is not in and of itself an appropriate or sufficient reason for the Court to appoint an expert. As the U.S. Magistrate pointed out, "Although an expert witness would be of value to the plaintiff, such can be said of virtually all civil cases."

(Resp. Br., Appendix 21a).

3. McKinney also complains the U.S. Magistrate refused to issue subpoenas he

requested be issued for certain experts. (Resp. Br. at p. 3). He fails to explain, however, the experts consisted of the Surgeon General and several unnamed representatives of federal agencies. The Court stated:

> Apparently plaintiff intends for the court to locate and procure one or more of these officials to provide testimony for him. He has not provided any information on where such individuals may be found or cited authority to show the court has jurisdiction to take such action. He does not indicate he has communicated with any such person so that he has any idea about their competence or ability to testify about his individual circumstances, etc. Thus, he is also asking the court to pick witnesses for him.
> The choosing and obtaining of witnesses for a party is that party's responsibility and in a civil case the paying of witness fees, transportation costs and the like also become that party's responsibility and not the court's or the opposing party's duty...a subpoena for a hearing or trial must be served within the district or if outside the district within 100 miles of the place of the hearing or trial...

(Resp. Br., Appendix 6a).

The record shows the U.S. Magistrate's ruling was sound, and McKinney has failed to give any reason to show it was not.

4. Respondent argues the U.S. Magistrate did not hear evidence or rule on whether petitioners (defendants at trial) were deliberately indifferent to petitioner's future potential injuries, only that they were not indifferent to his then-existing health symptoms, and therefore respondent should have the opportunity to prove the subjective component of Wilson on remand. (Resp. Br. at p. 17). McKinney suggests this was error on the part of the U.S. Magistrate, but it is not. The U.S. Magistrate can only rule on the evidence offered by the parties. McKinney presented his case in chief, and it was McKinney who failed to proffer sufficient admissible evidence to show deliberate indifference either to his presente or

future health. McKinney had his day in court and it was his burden, not the Court's, to prove his case. (Pet. Br. at pp. 32-33).

Similarly, McKinney states that the Ninth Circuit remanded the case to the district court because "the magistrate did not consider evidence which might indicate whether conditions at Carson City might pose such a[n] [unreasonable] risk [of harm] to Mr. McKinney." (Resp. Br. at p. 16). Once again, it was McKinney's burden to present sufficient admissible evidence for the U.S. Magistrate's consideration. Respondent appears to argue the question is whether the U.S. Magistrate "correctly dismissed a cause of action relating to the future effects of ETS exposure simply because he [McKinney] was not presently suffering any readily apparent effects of that exposure." (Resp. Br. at p. 18). The

case law by the U.S. Magistrate in her order granting the motion for a directed verdict clearly supported her decision. (Pet. for Writ of Cert., Appendix B).

C. INMATE EXPOSURE TO OTHERS' TOBACCO SMOKE IS NEITHER CRUEL NOR UNUSUAL UNDER THE EIGHTH AMENDMENT, GIVEN THE SPECULATIVE NATURE OF THE PERCEIVED RISK, SOCIETY'S AMBIVALENT ATTITUDES REGARDING SMOKING, AND THE EXISTENCE OF COUNTERVAILING PENOLOGICAL INTERESTS

Case law has long recognized a prisoner's right to a safe environment. Prison officials may not intentionally place prisoners in dangerous surroundings nor be deliberately indifferent to their serious medical needs. It is one thing, however, to deliberately place known enemies in the same cell, or to permit inmates with serious infectious diseases to come into contact with other inmates where contagion is a virtual certainty. These are circumstances where the danger is both obvious and imminent, and where . . .

there is no real dispute as to current societal standards of decency.

However, there are other conditions which may exist in prisons to which inmates are exposed for varying lengths of time and intensity, and for which the risk of harm is neither obvious nor imminent, and about which society does not universally agree. ETS is one of those conditions.

Just as non-prisoners are exposed to various risks accepted by society, prisoners cannot expect to be free of all risks to which they may be exposed. (Pet. Br. on Merits at pp. 17-19). The overwhelming majority of recent federal court decisions have held that decisions concerning exposure to ETS are best left to legislative enactments and to the judgment of those who must manage our prisons. (See Gorman v. Moody, 710 F.Supp. 1256, 1262 (N.D.Ind. 1989);

Kensell v. State of Oklahoma, 716 F.2d 1350, 1351 (10th Cir. 1983) and Federal Employees for Non-Smokers Rights (FENSR) v. United States, 446 F. Supp. 181, 185 (1978).

There are significant differences in the types of conditions discussed by McKinney and the instant case. That is, the degree to which the existence of secondary tobacco smoke is tolerated by society, and why cigarettes are an important management tool for prison administrators.

1. PRISON OFFICIALS' DISCRETION IN CONTROLLING INMATE POPULATIONS IS ESSENTIAL, AND PERMITTING INMATE SMOKING IS A LEGITIMATE AND NECESSARY MANAGEMENT TOOL.

Respondent implies the reason McKinney (a claimed non-smoker) possessed cartons of cigarettes in 1987 was they were used as a form of currency in the prison, and that cigarettes were distributed to inmates free of charge by the NDOP to

Nevada State Prison inmates. (Resp. Br. at p. 5). However, respondent fails to note this practice was discontinued in 1981, six years before he filed his lawsuit. The footnote also cites the amicus brief of the United States, which pointed out that distributing free cigarettes was "...a practice once followed in the federal prison system, where some inmates received free cigarettes as a means of 'institutional management and control and to prevent the development of extortionate practices in connection with the sale of cigarettes to inmates.'" (U.S. Br. at p. 19). Indeed, this is still a practice followed by some federal agencies.[1]

This is understandable in light of statistics showing that anywhere from 75% to 90% of inmates smoke. (U.S. Br. at p. 14, n. 8). There are a limited number of ways in which prison officials can occupy and control inmate populations, and thus any methods which are effective are important. (U.S. Br. at 13; Pet. Brf. on Merits at pp. 19-20). Inmates are permitted very few items of personal property and/or amenities, so that any possession or privilege becomes much more important to an inmate than to a person not in prison. Items such as tobacco, candy, magazines and televisions are typical examples of privileged items which prison officials use in managing difficult prisoners and to avoid inmate unrest. (U.S. Br. at p. 23).

Prison administrators view the availability of tobacco and the privilege of smoking as a significant inmate management tool. Those who must classify, house and control difficult and

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[1] Petitioners are informed that the Department of Immigration and Naturalization Services presently distributes cigarettes to federal detainees incarcerated at the Nevada State Prison.

dangerous persons who aren't where they want to be are daily confronted with safety and security concerns, as well as the need to keep as many inmates as possible occupied and reasonably content. When up to 90% of inmates smoke, smoking (as with television) plays an important role in accomplishing these goals.

This Court has long recognized the unique position of prison administrators and the extremely difficult tasks they face. It is difficult for those who have never operated a prison to appreciate the extent to which inmates attempt to manipulate, intimidate and abuse both prison employees and the court system in order to exercise some control over their housing and facility assignments, as well as over other aspects of their situation. It is imperative that this Court reaffirm the deference accorded prison officials in managing our nation's state and

federal prisons, and specifically recognize that exposure to ETS in a prison setting does not state an Eighth Amendment claim.

2. CURRENT LAWS, REGULATIONS AND CUSTOMS CLEARLY DEMONSTRATE SOCIETY'S AMBIVALENCE TOWARD SMOKING, AND EXPOSURE TO ETS DOES NOT VIOLATE CONTEMPORARY STANDARDS

There are many examples of the government's ambivalence toward tobacco. On the one hand, the Surgeon General cautions about the potential health hazard of extended exposure to secondary tobacco smoke, cautionary labels are required on cigarette packaging and many federal work places have smoking and non-smoking areas. (U.S. Br. at pp. 14-15, 18). On the other hand, the growth of tobacco is subsidized by the federal government, it has been a traditional practice for prisons to issue free cigarettes to inmates, and the Occupational Safety and Health

Administration has thus far not deemed it necessary to regulate smoking in the workplace. People smoke freely in their homes and in many public places. (U.S. Br. at 12, 22-23).

In Wilson v. Lynaugh, 878 F.2d 846 (5th Cir. 1989), cert. denied, 110 S.Ct. 417 (1989), the Court found a prisoner's suit challenging exposure to ETS concerned a condition more a discomfort or inconvenience rather than one considered either cruel or unusual, and stated, quoting Gorman v. Moody, supra, at p. 126, that "...society cannot yet completely agree on the propriety of nonsmoking areas and a smoke free environment." The Court stated:

> Society certainly includes the government. The government both bestows substantial subsidies on those who grow and process tobacco and, at the same time, demands warning labels on cigarette packages and supports the apparatus

. . .

> of the Surgeon General in his public exhortations against the evils of smoking tobacco.

(Wilson, at p. 851, n. 14).

The Ninth Circuit's first opinion in this case noted "the existence of widespread bans on smoking in public areas and confined places." (Resp. Br. at p. 7). However, the use of the word "bans" presents a somewhat inaccurate picture of the reality of such regulations. For example, the federal prison rules "designed to protect non-smokers" are essentially no different than the guidelines set forth in NDOP's Administrative Directive 35-92, and the Court is invited to compare the two. (See 28 C.F.R. 551.160 et seq). Respondent states the American Jailers Association "backed a ban on smoking in prisons." But he fails to state how many jailers have actually instituted bans or restrictions on smoking, and whether such

measures have been effective or not. It should be pointed out that jails traditionally house prisoners for much shorter periods of time than do state correctional facilities.[2]

Respondent states the Ninth Circuit found that "[c]ounty and state corrections departments in 13 states had either banned or were considering a ban on cigarette smoking in prison as of May 1990." (Resp. Br. at p. 7). This means 37 states apparently had <u>not</u> taken such action. The statement also does not clarify if the regulations to be imposed were total or partial smoking restrictions. A number of states, including Nevada, have statutorily

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. . .

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[2] Petitioners are informed that the average length of stay in a county jail in either of the two most populous counties (Washoe and Clark) is less than two weeks.

<u>excluded</u> prison facilities from such laws. (Pet. for Writ of Certiorari at p. 23).

Neither respondent nor the Court of Appeals noted that in state legislation restricting smoking in public places, there are often exceptions carved out for certain types of businesses, such as smaller restaurants. State legislatures balance competing interests and enact laws which in their judgment best accommodate those interests. For example, in Nevada smoking is generally prohibited in grocery stores, but smoking is permitted within the area of the store devoted to providing gaming machines for their patrons' amusement. Smoking is also permitted in any business which receives over half of its gross receipts from the sale of alcohol. (Nev. Rev. Stat. 202.2491, Pet. for Writ of Certiorari, Appendix F). Even where

smoking is generally prohibited in public buildings, statutes typically direct that areas designated for smokers be provided. (Nev. Rev. Stat. 202.2491, Pet. for Writ of Certiorari, Appendix F). It is therefore more accurate to state that in some states smoking is regulated, rather than banned, and society still tolerates and in some instances encourages smoking.

There does not appear to be any data (and respondent offers none) regarding the extent to which restrictions on smoking have been sought because exposure to ETS is offensive or irritating to a number of people, because it can be a fire hazard, or because of concern for the potential health problems.

Despite the existence of various regulations on smoking, "Secondary tobacco smoke is common in offices, restaurants, and other public places throughout the United States and the rest

of the world." Steading v. Thompson, 941 F.2d 498, 500 (7th Cir. 1991) [Court found that exposure of inmate to ETS was not a "serious deprivation" within the meaning of the test set forth in Wilson v. Seiter].

Respondent criticizes Petitioners for not attempting to rebut the "scientific and other authorities" used by the Ninth Circuit in reaching its conclusion that exposure to environmental tobacco smoke could violate the Eighth Amendment. (Resp. Br. at p. 11). Quite simply, petitioners were never given the opportunity by the Ninth Circuit to respond to the data relied upon by that Court. The Ninth Circuit's decision was a fait accompli, issued without having given either party an opportunity to brief the specific issue of whether exposure to certain levels of environmental tobacco smoke could state

an Eighth Amendment claim. The Court of Appeals did not limit itself to the points and authorities presented to it by the parties, but rather chose to rely on data not subject to the scrutiny of the briefing process.

Respondent asks this Court to find that exposure to a condition posing an unreasonable risk of serious harm states an Eighth Amendment claim, even where the inmate has not yet suffered any serious medical symptoms and specifically argues that exposure to ETS states such a claim. (Resp. Br. at pp. 30 - 36). McKinney offers several pages of "authorities" to buttress his claims that exposure to ETS is a health risk. Assuming that exposure to ETS presents a risk to one's health, the relevant questions are (1) whether the risk is statistically significant; (2) whether the risk is accepted in our society; and (3) whether the existence of

the risk is counterbalanced in a prison setting by other legitimate penological concerns.

Although McKinney cites studies to indicate that exposure to ETS may increase one's exposure to certain respiratory problems and to lung cancer, he fails to explain how and why this risk is statistically important. Although he states "the risk at issue here is also of a far greater magnitude than the risks that are regulated by the Occupational Safety and Health Administration" he does not correspondingly explain why OSHA is not presently imposing restrictions on exposure to ETS in the workplace. (Resp. Br. at p. 35)

McKinney relies also on a draft Surgeon General's report containing the opinion that exposure to ETS is "a cause" of lung cancer, and recommending that measures to protect the public from ETS

should be taken. (Resp. Br. at p. 36). McKinney does not state whether, compared with other health risks, the Surgeon General determined if ETS is a statistically major or minor cause of lung cancer. In any event, whatever the recommendations of the Surgeon General may be, it is up to the legislature to decide whether it exposure to ETS is a problem sufficient "to justify appropriate remedial action." (Resp. Br. at p. 36).

A review of case law, legislative enactments, and the actions of regulatory agencies indicate that our society does not at this time view exposure to ETS as a significant enough health risk to warrant any greater protective action than has already been taken. Clearly, any potential health risks which may be associated with exposure to ETS are still tolerated in our society, just as the far

greater risks linked to automobile travel are tolerated because the risks are counterbalanced by a competing social interest in mobility. Similarly, the presence of knives and guns is tolerated even though the risk of harm is self-evident, as such implements also serve other important purposes.

It is clear that persons who are not incarcerated have no constitutional claim to pursue should they believe they have been subjected to substantial quantities of secondary tobacco smoke. (Pet. Br. at pp. 29-30; See also Caldwell v. Quinlan, 729 F. Supp. 4 (D.D.C. 1990) aff'd, 923 F.2d 2009 (D.C.Cir. 1990). The general public is limited to pursuing tort claim remedies, and inmates have the same opportunity to litigate claims of exposure to unreasonable risks of harm.

It is worth noting that meeting a negligence standard requires a lower

burden of proof than does reaching the level needed to sustain a constitutional claim, yet claims against cigarette companies by smokers and those exposed to ETS have met with little or no success. It would be unusual, indeed, if inmates could state constitutional claims regarding ETS, while non-incarcerated litigants have no constitutional protection and, as a practical matter, no realistic chance of prevailing in tort claims on the same issue.

3. EXPOSURE TO ETS DOES NOT MEET THE OBJECTIVE TEST OF WILSON V. SEITER BECAUSE THERE IS NO SERIOUS DEPRIVATION OF A BASIC HUMAN NEED, AND NO INFLICTION OF PAIN.

In DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 200 (1989) the Court stated prison officials have a responsibility to provide for an inmate's "basic human needs", such as food, clothing, shelter, medical care and safety. The Ninth

Circuit itself is frequently quoted regarding the extent to which prison systems must provide for inmates:

> [A]n institution's obligation under the eighth amendment is at an end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care and personal safety.

(Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982), quoting Wright v. Rushen, 642 F.2d 1129, 1132-1133 (9th Cir. 1981). The objective portion of an Eighth Amendment claim is only met when it can be shown an inmate has suffered a sufficient harm involving the deprivation of "the minimal civilized measure of life's necessities" Rhodes v. Chapman, 452 U.S. 337, 346 (1981). Once the State has provided an inmate with these essential human needs, however, its obligation "is at an end." Hoptowit v. Ray, supra.

One may sympathize with the discomforts suffered by those in prison,

including non-smokers who dislike the exposure they may have to ETS. But an inmate cannot state an Eighth Amendment claim on the grounds that exposure to ETS deprives them of any basic human need. Likewise, the desire to be housed in an environment where exposure to ETS is limited does not involve a sufficiently serious injury to be considered either cruel or unusual.

McKinney disagrees with the recent decision of the Tenth Circuit in Clemmons v. Bohannon, 956 F.2d 1523, 1527 (10th Cir. 1992) (en banc), in which that Court pointed out the U.S. Supreme Court has not ever "held that a potential, distant harm to a prisoner's health is a serious medical need." (Resp. Br. at p. 22). He asserts this would limit Eighth Amendment claims to situations involving either immediate injuries or a virtual certainty of future death or painful illness. But

this drastic situation is not the logical conclusion to be drawn from Clemmons. There is nothing in the Tenth Circuit's opinion to foreclose all Eighth Amendment claims where the likelihood of serious harm is clear, although neither immediate nor certain, the condition of confinement is unacceptable under society's evolving standards of decency, and there is no important countervailing penological interest.

Petitioner lists numerous cases where courts have held that inmates "need not wait [until they are physically assaulted]" before obtaining injunctive relief against conditions posing a threat to their personal safety (citing Ramos v. Lamm, 639 F.2d 559, 572 (10th Cir. 1980; Morgan v. District of Columbia, 824 F.2d 1049 (D.C. Cir. 1987; Purvis v. Ponte, 929 F.2d 822 (1st Cir. 1991)). Petitioners submit McKinney cannot

establish the elements necessary to obtain injunctive relief, since he has not set forth facts to show he will suffer irreparable harm from being housed with a smoker. This condition of confinement is not comparable to the situations in which plaintiffs were able to demonstrate that their immediate physical safety was in serious jeopardy.

It is well established that some conditions of confinement which involve occasional, or short-term, or uncomfortable, or of de minimus impact upon a prisoner, are not Eighth Amendment violations. If these same conditions persist for longer periods of time, however, the possibility that the condition may be considered cruel and unusual increases. (Hutto v. Finney, 437 U.S. 678, 687 (1978)).

McKinney speculates that although occasional or short-term exposure to ETS

would not result in an Eighth Amendment violation, "evidence of indifference to a constant exposure at levels that pose an unreasonable risk of serious injury would be another matter entirely." (Resp. Br. at p. 26). Petitioners believe the inquiry is whether any potential future risk of harm to an inmate's health from exposure to environmental tobacco smoke can be considered cruel and unusual punishment. It is respectfully submitted that it cannot, due to the peculiar status of smoking within our society and its importance in the prison setting, and because any risk of potential future harm to one's health is, at this point, simply too speculative.

Respondent argues the risk of future harm to his health is logically included in the definition of what constitutes "serious injury" sufficient under Wilson v. Seiter. Petitioners disagree.

Although courts have held an inmate need not wait until he experiences physical injury in order to obtain relief, the conditions which may qualify for protection in this area are distinguishable from exposure to ETS.

1. Smoking is socially acceptable to the vast majority of inmates (from 75% to 90% according to estimates (U.S. Br. at p. 14, n. 8);

2. The sale and consumption of tobacco is legal in all states and is not prohibited under current health and safety regulations; (U.S. Br. at p. 12).

3. Any potential health risk from the exposure to ETS is neither certain nor imminent, and is as yet completely speculative as to any individual;

4. Elimination or reduction of the conditions referred to by respondent is not intertwined with complex housing,

. . .

classification and security decisions peculiar to prison management;

5. Any ventilation problems which inmates might face by exposure to ETS can be addressed adequately through legislation, and by health and safety agencies responsible for air quality regulation;

6. This particular condition of confinement, unlike other challenged conditions, involves a personal habit shared by a large percentage of people, and which is generally tolerated in our society; (U.S. Br. at p. 12).

7. Any potential risk from ETS is counterbalanced by the importance of allowing prison administrators the necessary discretion to balance a number of safety and security concerns, and to permit smoking among inmates as a significant prison management tool.

. . .

(Pet. Br. on Merits at pp. 19-20; U.S. Br. at 13).

Petitioners do not dispute the need to protect inmates from conditions which society in general finds unacceptable to the point of being cruel and unusual, and which otherwise satisfy the requirements of Wilson v. Seiter. But exposure to environmental tobacco smoke involves a widespread personal habit which is not only accepted in our society, but often supported and encouraged. Just as important to the resolution of this issue is the need to recognize the importance of preserving prison administrators' precious few methods of managing the most volatile and discontented members of our society, and the need for wide discretion and flexibility in making housing decisions when housing options may be severely limited.

. . .

III.

CONCLUSION

For the reasons set forth herein, Petitioners ask this Court to vacate the judgment of the Ninth Circuit Court of Appeals, and to hold that an inmate cannot state an Eighth Amendment claim by alleging compelled exposure to environmental tobacco smoke in the absence of existing related health problems.

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Respectfully submitted.

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